IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 206 Miscellaneous

Ex Parte JOSEPH COLLETT;

Petitioner

BRIEF OF THE RESPONDENT, HONORABLE FRED L. WHAM, UNITED STATES JUDGE FOR THE EASTERN DISTRICT OF ILLINOIS, IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR ORDER TO SHOW CAUSE WHY WRITS OF MANDAMUS AND PROHIBITION SHOULD NOT ISSUE.

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STATEMENT.

By his motion for leave to file a petition for a writ of mandamus to the Honorable Fred L. Wham, United States Judge for the Eastern District of Illinois, and for a writ of prohibition to the Honorable H. Church Ford, United States District Judge for the Eastern District of Kentucky, petitioner desires to have this Court review an order of the United States District Court for the Eastern District of Illinois, entered October 18, 1948. This order (Appendix to Petition, page 23) granted in the exercise of the Court's judicial dis-

cretion the defendant's, Louisville & Nashville Railroad Company's motion to transfer the trial of this action to the United States District Court for the Eastern District of Kentucky at Lexington, Kentucky. Judge Ford, of the Eastern District of Kentucky, assigned the case for trial within that district to Richmond, Kentucky. Petitioner states in his memorandum in support of the motion that he is a resident of Irvine, Kentucky, where the accident occurred, which is approximately 26 miles from Richmond, Kentucky. The accident resulted in an action under Federal Employers' Liability Act (45 U. S. C. A. 51-60) to recover damages in the sum of $150,000.

The petitioner seeks to secure this Court's jurisdiction directly. The petitioner has not applied for mandamus against Judge Wham in the Court of Appeals for the Seventh Circuit, and he has not petitioned the Court of Appeals for the Sixth Circuit for a writ of prohibition directed to Judge Ford.

GROUNDS OF OPPOSITION TO THE MOTION.

Respondent opposes this motion on the following grounds:

I. Petitioner has made no prior application for the same relief to the Court of Appeals for the Seventh Circuit and to the Court of Appeals for the Sixth Circuit.

II. There is no issue of vital importance as to warrant this Court in exercising its discretion in petitioner's favor.

III. This Court lacks jurisdiction to grant the relief requested, as the most the petition could possibly show as error is the exercise of judicial power, not illegal seizure of judicial power by the District courts.

IV. The power of this Court is sought, not in aid of its appellate jurisdiction, but as a substitute for an appeal which is not permitted by statute.

V. Petitioner's contention that Federal Employers' Liability Act cases are not within the scope of Section 1404(a) of Title 28, United States Code, is erroneous.

I. Petitioner Has Made No Prior Application for the Same Relief to the Court of Appeals for the Seventh Circuit and to the Court of Appeals for the Sixth Circuit.

Assuming for the purposes of argument that this Court had jurisdiction under 28 U. S. C. 1651(a) to grant this motion for leave to file a petition for writ of mandamus or prohibition, the petitioner's motion made prior to any application to the Court of Appeals for the Seventh and Sixth Circuits should be denied. This Court has stated the rule distinctly and correctly in *Ex Parte Peru*, 318 U. S. 578, p. 584:

> "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the Court. *Re Skinner & E. Corp.*, 265 U. S. 86, 95, 96, 68 L. Ed. 912, 915, 44 S. Ct. 446; *Ex parte Monterey*, 269 U. S. 527, 70 L. ed. 395, 46 S. Ct. 16; *Maryland v. Soper*, 270 U. S. 9, 29, 70 L. ed. 449, 456, 46 S. Ct. 185; *United States ex rel. Greathouse v. Dern*, 289 U. S. 352, 359,

77 L. ed. 1250, 1254, 53 S. Ct. 614; and are usually denied where other adequate remedy is available. *Ex Parte Baldwin*, 291 U. S. 610, 78 L. ed. 1020, 54 S. Ct. 551, 24 Am. Bankr. Rep. (N. S.) 487. And ever since the statute vested in the circuit courts of appeals appellate jurisdiction on direct appeal from the district courts, this Court, in the exercise of its discretion, has in appropriate circumstances declined to issue the writ to a district court, but without prejudice to an application to the circuit court of appeals (*Ex parte Apex Electric Mfg. Co.*, 264 U. S. 725, 71 L. ed. 1342, 47 S. Ct. 766; *Ex Parte Daugherty*, 282 U. S. 809, 75 L. ed. 726, 51 S. Ct. 180; *Ex Parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533, 76 L. ed. 1273, 52 S. Ct. 621), which likewise has power under §262 of the Judicial Code, 28 U. S. C. A. §377, 8 F. C. A. title 28, §377 to issue the writ. McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762, 30 S. Ct. 501; *Adams v. United States*, 317 U. S. 269, *ante*, 268, 63 S. Ct. 236, 143 A. L. R. 435."

The same rule in this particular is applicable to both writs of mandamus and writs of prohibition. *Ex Parte Peru, supra*, p. 584. In the *Peru* case the Court granted the motion for leave to file a petition for a writ prior to application in the Court of Appeals, but the Court made it clear that it was only in cases of great public importance and exceptional character that such action would be taken. In the *Peru* case there was a clash between the executive branch of the Government, which had certified sovereign immunity, and the judicial branch, which had refused to recognize the

certification. Here there is no such conflict and no extraordinary circumstances presented. Therefore, it is submitted that a motion for leave to file the petition should be denied as there is a more appropriate procedure available. *Ex parte Mars, Inc.*, 320 U. S. 17; *Ex Parte Fred Brandoff Co.*, 317 U. S. 594; see *Ex Parte United States*, 287 U. S. 241, pp. 248-49.

In *U. S. Alkali Export Association* v. *United States*, 325 U. S. 196, and the *De Beers Consolidated Mines, Ltd.*, v. *United States*, 325 U. S. 212, suits of an equitable nature by the United States under Section 4 of the Sherman Act (15 U. S. C. 4); petitions for writs of certiorari to the District Courts in the first instance were allowed by this Court because sole appellate jurisdiction lay in this Court under Section 29 of the Act. (15 U. S. C. A. 29). Therefore, in this action the Court correctly stated in the *Alkali Export Association, supra*, case, p. 202, that "application for the common law writ in aid of appellate jurisdiction must be to this Court." However, Chief Justice Stone reaffirmed the rule of *Ex Parte Peru* as applicable in all cases of which this Court does not have *sole* appellate jurisdiction:

> "In the usual case this Court will decline to issue a writ prior to review in the Circuit Court of Appeals, whether by ordinary appeal (In *re Tampa Suburban R. Co.*, 168 U. S. 583, p. 588) or by extraordinary remedy (*Ex Parte Peru, supra*, p. 584)."
>
> *U. S. Alkali Export Association, Inc.*, v. *United States, supra*, p. 202.

Since the present case is one in which both this Court and the Court of Appeals for the Sixth and Seventh Circuits have appellate jurisdiction, the rule as stated in *Ex Parte Peru, supra,* is applicable, and application should first be made to the respective Courts of Appeals.

II. There Is No Issue of Vital Public Importance as to Warrant This Court in Exercising Its Discretion in Petitioner's Favor.

Conceding for the purpose of argument this Court's jurisdiction, the petitioner's motion for leave to file a petition for these two common law writs should be denied upon the ground that the petitioner does not show that he is entitled to the relief requested.

The only effect of the order of transfer is that the petitioner will present his cause of action to a Federal Court and jury in Richmond, Kentucky, rather than East St. Louis, Illinois. It is difficult to understand how the petitioner will be prejudiced in any legal sense by this transfer. It would appear obvious that he may be able to subpoena necessary witnesses for the trial in Richmond, Kentucky, whose presence could not be secured at a trial in East St. Louis, Illinois. From any viewpoint taken, the petitioner's motion does not present a really extraordinary cause which would entitle him to the drastic and unusual remedy sought herein. *Ex parte Fahey,* 332 U. S. 258, 260; *Ex parte Mars, Inc.,* 320 U. S. 710.

III. This Court Lacks Jurisdiction to Grant the Relief Requested, as the Most the Petition Could Possibly Show as Error Is the Exercise of Judicial Power, Not Illegal Seizure of Judicial Power by the District Courts.

The petitioner in his motion for leave to file the petition for these extraordinary remedies maintains that the action of the District Court for the Eastern District of Illinois is void (Petition, page 2). This conclusion is based on the petitioner's conclusion that the order from the Eastern District of Illinois was based on the hypothesis that Section 1404(a), Title 28 U. S. C., effective September 1, 1948, amended, repealed and superseded Section 6 of the Federal Employers' Liability Act, Section 56, Title 45 U. S. C. A. Petitioner argues that Section 1404(a) of Title 28 U. S. C., giving discretion to the District Court to transfer "any civil action" for the convenience of the parties and witnesses and in the interest of justice to any other districts where it might have been brought, has no application whatever to a civil action brought under the Federal Employers' Liability Act.

In brief, it is the petitioner's contention that the application of the doctrine of "*forum non conveniens*" is not placed in effect by the new statute. However, prior to September 1, 1948, it must be conceded that Judge Wham would have had the judicial power to dismiss this action on the ground of "*forum non conveniens*," even though such a decision would have been erroneous. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, p. 505, and cases cited therein. Thus, the conclusion

seems undeniable that the petitioner's complaint is not concerned with the illegal seizure of power by the District Court, but merely with an alleged misconstruction of a statute in the exercise of conceded judicial power. See *Ex parte United States*, 287 U. S. 241, 249. Therefore, this Court lacks jurisdiction as we have a question of judicial discretion, and the relief requested should be denied on this ground alone. *Ex parte Chicago, R. I. & Pac. R. Co.*, 255 U. S. 273, 279-80; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 26-32; *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196, 202 (see *Ex parte United States, supra*, page 249).

IV. The Power of This Court Is Sought, Not in Aid of Its Appellate Jurisdiction, But as a Substitute for an Appeal Which Is Not Permitted by Statute.

Sec. 1651(a), Title 28, U. S. C., covers the jurisdiction of this Court to issue all writs as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

The statutory authority of this Court to issue writs of mandamus or prohibition to District Courts can be exercised only if such writs are in aid of appellate jurisdiction. *Ex parte Peru*, 318 U. S. 578, 582; *Ex parte United States*, 287 U. S. 241, 248-49. This Court, in addition, has the power to issue the writ although a direct appeal is allowed to the Court of Appeals, if

this Court has ultimate jurisdiction by certiorari. *Ex parte Peru, supra*, 584-85; *Ex parte United States, supra*, page 248.

These rules do not cover the Court's jurisdiction in this case for the Court of Appeals for the Sixth and Seventh Circuits are not vested by statute with direct appellate jurisdiction over this order of transfer. Therefore, it is outside the power of this Court to act in aid of an appellate jurisdiction that likewise could not exist. The order here entered by the District Court for the Eastern District of Illinois merely transferred the trial of this action to Kentucky. The order is not final in any respect as regards the merits of the case. Thus, the Court of Appeals for the Seventh Circuit and the Sixth Circuit would be without appellate jurisdiction, since it may only review, with exceptions not here material, "appeals from final decisions of the District Court, except where a direct review may be had in a Supreme court." 28 U. S. C. 1291. See *Roche v. Evaporated Milk Association*, 319 U. S. 21, 29-30.

In criminal actions this Court has recognized the non-appealability of such a transfer order. In *United States v. National City Lines, Inc.*, 334 U. S. 573, at 594, where an order of transfer had been entered pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, Mr. Justice Rutledge stated:

> "Moreover, it is at least doubtful whether the Government had a right to appeal from the order of transfer in the criminal case." See also *Seuel v. United States*, 158 F. 2d 231, 232.

Therefore, the petitioner is attempting to suggest to this Court that it substitute mandamus for an appeal contrary to the statutes and policy of Congress. *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 32.

As the Court stated in the Roche case, *supra*, at page 30:

> "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Cobbledick* v. *United States*, 309 U. S. 323. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. 'The effect therefore of this mode of interposition would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times before there would be a final judgment.' *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569. See also *Life & Fire Insurance Co.* v. *Adams*, 9 Pet. 573, 602; *Ex parte Hoard*, 105 U. S. 578, 579-80; *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379."

V. Petitioner's Contention That Federal Employers' Liability Act Cases Are Not Within the Scope of Section 1404(a) of Title 28 United States Code Is Erroneous.

The respondent maintains that Section 1404(a) of Title 28, U. S. C., effective September 1, 1948, permitting the transfer of any civil action to any other District or Division where it might have been brought pertains to actions under the Federal Employers' Liability Act. The respondent rests his case on reasoning and logic of the following three opinions:

Nunn v. *Chicago, Milwaukee, St. Paul and P. R. Co.*, 80 F. Supp. 745 (S. D., N. Y.).

U. S. v. *National City Lines*, 80 F. Supp. 731 (S. D., Calif.).

Hayes v. *Chicago, Rock Island and Pacific R. Co.*, 79 F. Supp. 821 (D. C., Minn.).

The crux of this question is what is the meaning of the term "any civil action" as used in 1404(a) of Title 28, U. S. C. The respondent submits that from the clear and unambiguous language of the statute as well as its purpose, and from the reviser's notes coupled with the legislative history, actions under the Federal Employers' Liability Act are included within this term.

Section 1404(a) of Title 28, U. S. C., is a segment of the New Judicial Code. The purpose of the Code, as shown by the Report of House and Senate Judiciary Committee, was not to amend existing acts but to revise the entire Judicial Code to where it was to speak authoritatively as the law and not presumptively. Senate

Report 1559, 80th Cong. 2d Session, 28 U. S. C., Congressional Service, pages 1675, 1676. House Report No. 308, 80th Cong., 2d Session, 28 U. S. C., Congressional Service, pages 1692, 1693. House Report No. 308, 80th Cong., 1st Session, Professor James W. Moore's statement before House Judiciary Committee, 28 U. S. C. Congressional Service, pages 1967, 1968. In accomplishing his purpose a new jurisdictional and procedural system was enacted that did not exist before, and as a part of this system a new procedural method was added permitting the transfer of cases from one district to another. *U. S. v. National City Lines,* 80 F. Supp. 734, 737 (S. D., Calif.). In order to create uniformity of expression with the Federal Rules of Civil Procedure all-inclusive terms were dropped in favor of the single term "any civil action."

In enacting this new provision the legislative history is conclusive that the provisions of Section 1404(a) were to include Federal Employers' Liability cases. When Congress desired to exempt case under the Employers' Liability Act it specifically did so as in Section 1445(a) of Title 28, U. S. C., denying the right of removal from State Courts to Federal Courts. Attached to the Report submitted by the Committee on Judiciary of the House of Representatives (H. Report 308, 80th Congress, 1st Session, April 25, 1947, 28 U. S. C., Congressional Service, page 1692), were the reviser's notes which explained the sources of the law and changes made in codification. S. Report No. 1559, 80th Cong., 2d Session, June 9, 1948, page 2, 28 U. S. C., Congressional Service, page 1675. In attempting to

show the need for Section 1404(a), which incorporated the doctrine of "*forum non conveniens*," the reviser cited *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, a case under the Federal Employers' Liability Act, in the following words:

> "Subsection (a) was drafted in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6; 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." 28 U. S. C., Congressional Service, page 1853.

The reference to this Court's opinion was not a coincidence. The history of the reviser's notes shows without the shadow of a doubt that Section 1404(a) was tailored to fit the situation here presented and to give the District Court discretion to transfer the case in the interest of justice. The Second Draft of the Code, together with the reviser's notes, had been circulated during 1945 to the Advisory Committee, the Judicial Conference Committee, the Judicial Consultant, Judge Parker; Special Consultants, Judge Holtzoff and Professor James W. Moore, as well as to every member of the Congress. Those directly con-

nected with the revision met in Hershey, Pennsylvania, in May of 1945 and discussed the matter of the New Code, section by section, in a very careful manner. Statement of Hon. Albert B. Maris, U. S. Circuit Judge for the Third Circuit, before Subcommittee 1 of the House Judiciary Committee, March 7, 1947, 28 U. S. C., Congressional Service, page 1958. The reviser's note as attached to the Second Draft was as follows:

> "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of *'forum non conveniens'* permitting transfer to a more convenient forum, even though the venue is proper. The author gave as an example for the need of such a provision *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

There is no doubt that the reviser's notes were directed to the attention of the Congress. *Nunn* v. *Chicago, Milwaukee, St. P. and Pac. R. Co.*, 80 F. Supp. 745 (S. D. N. Y.) at 747, and citations.

It is Professor Moore's view that the case here presented is within the provisions of §1404(a). In Volume

3, Moore's Fed. Practice (Second Edition), published December, 1948, the author states as follows:

§19.04, page 2141:

"The Judicial Code Revision did not change the underlying basic principles of venue. It did, however, make some substantial changes and certainly put venue on a more workable basis. It adopts the principle of *forum non conveniens*, but provides for a transfer, not dismissal, of any action to a proper and more convenient forum."

Page 2141—Note 107:

"Any action in §1404(a) includes suits subject to special venue statutes, as suits for patent infringement and suits under the Federal Employers' Liability Act, as well as actions subject to the general venue statute."

This explanation of the citation to the *Kepner* case in the reviser's note, buttressed by the clear language of Section 1404(a), conclusively shows the Congressional intent to include civil actions under the Federal Employers' Liability Act within the provisions of that section. The Congress has deemed the holding of this Court in *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, unfair and has followed this Court's suggestion at page 54 in the same case by enacting appropriate legislation establishing the doctrine of *forum non conveniens*. *Nunn* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 80 F. Supp. 745, at 747 (S. D., N. Y.).

This interpretation of Section 1404(a) in no way conflicts with Section 6 of the Employers' Liability

Act (Sec. 56, Title 45, U. S. C. A.) as Section 6 merely states where the action "may be brought," but it does not provide it must remain there. Thus, there is no inconsistency between the two acts (*Numn* case, *supra*, 747), and the new section does not take away any of the rights of the special venue statute permitting "forum shopping." *U. S.* v. *National City Lines, supra*, p. 740-741. An action may still be brought in any district meeting the requirements of the special venue statute, and the burden is then on defendant to establish its right to transfer. *Hayes* v. *Chicago, R. I. & P. R. Co.*, 79 F. Supp. 821, at 825 (D. C., Minn.). Thus, Section 1404(a) does not as a matter of right grant defendant the right to transfer.

There has been no repeal of Section 6 of the Employers' Liability Act (Sec. 56, Title 45, U. S. C. A.) by implication, and the cases cited by the petitioner that a general statute does not repeal a specific statute are not in point. Section 1404(a) can be fitted into the existing scheme, and this Court should so construe it if possible. *United States* v. *State of Arizona*, 295 U. S. 174, 191. But the purpose of this rule is to give effect to the presumed intention of the law-making body when its intent cannot be shown from other evidence. The primary rule of statutory construction requires the ascertaining of the legislative intent and to give it effect. *U. S.* v. *Hartwell*, 73 U. S. 385; *Flippin* v. *U. S.*, 121 Fed. 742, 745 (C. C. A., 8th); *U. S.* v. *Windle*, 158 Fed. 196, 199 (C. C. A., 8th). When that can be ascertained as in this case, the rule does not prevail. *U. S.* v. *National City Lines*, 80 F. Supp. 734, 740 (S. D., Calif.); and cases cited.

It is also submitted that failure of Congress to enact the Jennings Bill is not persuasive that Section 1404(a) was intended to exclude civil actions under the Federal Employers' Liability Act. The Jennings Bill was in no way an enactment of the doctrine of *forum non conveniens*, but it required suit to be brought in the jurisdiction in which the cause of action arose, or in which the person suffering death or injury resided at the time it arose, and withdrew from plaintiff any choice of forum except where defendant could not be reached with process in either of the two above situations. No such provision is contained in Section 1404(a). Under Section 6 of the Federal Employers' Liability Act (Sec. 56, Title 45 U. S. C. A.) the plaintiff may still select any forum he is permitted under the special statute, but once he is there he is under the power of the Court after considering all the facts to determine whether that is the most suitable place for trial. *Nunn* v. *Chicago, Milwaukee, St. P. & P. R. Co., supra*, p. 748; *Hayes* v. *Chicago, R. I. & P. R. Co., supra*, p. 825. This is an entirely different provision than that incorporated in the Jennings Bill, and the refusal of Congress to enact it does not mean that Section 1404(a) was not to apply to Federal Employers' Liability civil actions in District Courts.

In conclusion, respondent urges that Section 1404(a) should be applied to actions pending at the date it became effective as the rule forbidding such application pertains only to statutes dealing with substantive rights and not to procedure. Matters of venue and changes of venue are incidents of procedure and remedies, and statutes relating to them operate in retro-

spect. *Baltimore & P. R. Co.* v. *Grant*, 98 U. S. 398; *Hallowell* v. *Commons*, 239 U. S. 506; *Benas* v. *Maher*, 128 F. 2d 247 (C. C. A. 8th).

CONCLUSION

Petitioner's motion for leave to file a petition for a writ of mandamus to the Honorable Fred L. Wham, United States District Judge for the Eastern District of Illinois, East St. Louis, Illinois, should be denied, and the petitioner's motion for leave to file a petition for a writ of prohibition directed to the Honorable H. Church Ford, United States District Judge for the Eastern District of Kentucky, should be denied.

Dated: Louisville, Kentucky, January 25, 1949.

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